NO. 23-15249

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BAHIG SALIBA,

Plaintiff and Appellant,

vs.

AMERICAN AIRLINES, INC., ET AL

Defendants and Appellees.

FOLLOWING THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA
HON. STEPHEN P. LOGAN, CASE NO. 22-CV-00738-PHX-SPL

APPELLEES' ANSWERING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendants and Appellees American Airlines, Inc., Chip Long, and Timothy Raynor, by their attorneys, hereby state:

American Airlines, Inc. is a wholly-owned subsidiary of American Airlines Group, Inc., a publicly-held corporation (NASDAQ: AAL). The Vanguard Group, Inc., owns at least 10% of American Airlines Group Inc.'s stock.

Respectfully submitted,

DATED: June 22, 2023

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By /s/ *Kiran Aftab Seldon*
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INTRODUCTION

Plaintiff-appellant Bahig Saliba is a pilot for defendant-appellee American Airlines ("American"). In the midst of the COVID-19 pandemic, Saliba refused the directions of the TSA and airport police to wear a mask in Spokane International Airport, violating American's policies and the federal mask mandate then in effect. Saliba, who was en route to pilot an American flight from Spokane to Dallas, maintained then—as he does now—that American had no right to enforce its masking policies.

Saliba's suit challenges American's decisions to discipline him for the Spokane incident and to require a fitness-for-duty examination in accordance with the Joint Collective Bargaining Agreement (JCBA) that governs his employment. The central, faulty premise of Saliba's suit is that he—and he alone—has the right to decide whether he is medically fit to fly. That absolute right, Saliba argues, trumps American's masking and vaccination policies, as well as federal law.

The District Court, after granting him multiple opportunities to amend, correctly held that Saliba's Third Amended Complaint stated no plausible claim for relief. The order dismissing the operative complaint with prejudice must be affirmed.

JURISDICTION

Saliba invoked the jurisdiction of the District Court under 28 U.S.C. § 1331 based on, among other things, his cause of action under 42 U.S.C. § 1983. 6-SER-1304. On January 30, 2023, the District Court dismissed Saliba's operative Third Amended Complaint with prejudice, and entered final judgment. SER-2-3. On February 22, 2023, Saliba timely appealed the judgment. SER-19. This Court has jurisdiction over the appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

(1) Whether dismissal without leave to amend of Saliba's breach of contract claim must be affirmed because (a) he failed to plausibly allege the existence of any "employment contract" besides the JCBA, and (b) he failed to plausibly allege any breach of the alleged employment contract.

(2) Whether the District Court correctly dismissed without leave to amend Saliba's "aviation law" claim because the Federal Aviation Act and regulations on which he relies do not authorize a private right of action.

(3) Whether the District Court correctly dismissed without leave to amend Saliba's claim under 42 U.S.C. § 1983 because he failed to plausibly allege that Defendants acted "under color of state law" when enforcing their private company policies and their procedures under the JCBA.

(4) Whether dismissal without leave to amend of Saliba's "hostile work environment" claim must be affirmed because he failed to plausibly allege that Defendants' conduct was based on his national origin.

ADDENDUM

Relevant statutes and rules appear in an addendum hereto, per FRAP 28-2.7.

STATEMENT OF THE CASE

A. The parties.

Plaintiff Bahig Saliba is a pilot employed by defendant American Airlines, Inc. ("American"). 6-SER-1302. During the relevant time period, Defendant Chip Long was American's Senior Vice President of Flight; defendant Timothy Raynor was American's Director of Flight; and defendant Alison Devereux-Naumann was a Chief Pilot. 6-SER-1302; 2-SER-84.

B. Saliba's original Complaint.

On May 2, 2022, Saliba filed suit against Defendants, asserting claims primarily arising out of American's masking policies. 6-SER-1302. The following allegations are taken from Saliba's Complaint, as well as materials submitted by Defendants in support of their motion to dismiss.[1]

[1] Submission of extrinsic materials was appropriate for two reasons. First, Saliba incorporated certain documents by reference into his Complaint (such as American's masking policy and the collective bargaining agreement), which permits courts to consider them under Rule 12(b)(6). *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005). Second, courts may consider extrinsic evidence when

1. Federal mask mandates and American's mask policy.

As a result of the COVID-19 pandemic, the federal government, local airports, and American implemented new requirements for pilots (and others) to wear protective face masks in airports and onboard aircraft. 6-SER-1309:28-29, 1313:14-18.

Specifically, on January 21, 2021, President Biden issued Executive Order 13998, which directed the Administrator of the Federal Aviation Administration ("FAA") and the Administrator of the Transportation Security Administration ("TSA") to "immediately take action … to require masks to be worn" while on any means of public transportation. 6-SER-1309:3-23.

On January 31, 2021, the TSA issued Security Directive SD 1542-21-01, which required all airport operators (the bodies that own and/or control airport operations) to make their best efforts to inform all persons in their facilities that "[f]ederal law requires wearing a mask at all times in and on the airport." 6-SER-1309:28-29; SD 1542-21-01. The TSA also issued SD 1544-21-02, which applied the same requirements to aircraft operators, such as American.[2] 6-SER-1309:28-29; SD 1544-21-02. This SD required "that direct employees [of aircraft operators]

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ruling on a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1). *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

[2] SD 1542-21-01 is available at www.tsa.gov/sites/default/files/sd-1542-21-01.pdf. SD-1544-21-02 is available www.tsa.gov/sites/default/files/sd-1544-21-02.pdf.

… wear a mask at all times while on an aircraft or in an airport location under the control of the aircraft operator….” SD 1544-21-02.

On February 1, 2021, American announced updated mask policies to align with the TSA Security Directives. 6-SER-1245, ¶4. American’s policies required its pilots to wear masks when they were in airports and on airplanes (with the exception of the flight deck, where pilots were not required to wear masks at all times). 6-SER-1245, ¶4; 6-SER-1315. American’s mask policies stayed in place until April 18, 2022, when the federal mask mandate stopped being enforced. 6-SER-1246, ¶9.

2. The December 6, 2021 incident.

Saliba “disagreed with [American’s] mask policies,” believing that they “compelled pilots to submit to acts that potentially violated [pilots’] medical certificates,” which the FAA requires in order for pilots to be able to fly. 6-SER 1306,1317. His disagreement culminated in an incident on December 6, 2021. 6-SER-1318.

On that day, Saliba reported for duty at the Spokane International Airport to pilot a flight to Dallas Fort Worth. *Id.* Saliba was not wearing a mask, which he alleged was “in compliance with his medical certificate requirements” and an exemption in the TSA security directives for those for whom masking would pose a “risk to workplace health, safety, or job duty.” 6-SER-1310, 1318. When Saliba

approached the TSA security checkpoint, a TSA officer asked Saliba to wear a mask. 6-SER-1318. When Saliba refused, the TSA officer contacted airport police. *Id*. The airport police also asked Saliba to wear a mask, and he again refused. *Id.*

After 15 minutes, Saliba alleges, the police allowed him to proceed through the airport to his scheduled flight, but the police notified American of the encounter. 6-SER-1319. When Saliba landed in Dallas Fort Worth, he alleges that American removed him from flying status and placed him on administrative leave pending an investigatory hearing. *Id.*; 6-SER-1245, ¶3; 6-SER1253-54, §21(B) (describing investigation process).

3. Pursuant to the collective bargaining agreement, American holds a hearing and issues a notice concerning the incident.

American pilots are represented by the Allied Pilots Association ("APA"), which negotiated a Joint Collective Bargaining Agreement ("JCBA") that governs the terms and conditions of employment for American's pilots. 6-SER-1303, 1306:1-4; 6-SER-1245, ¶¶2-3. The JCBA includes "Section 21 - Discipline, Grievances, Hearings, and Appeals" and "Section 23 - System Board of Adjustment," which provide the parameters for pilot discipline and the procedures for pilots to grieve and arbitrate such discipline. 6-SER-1245, ¶3; 6-SER-1252-62, §§ 21, 23.

A "Section 21" investigatory hearing was held on January 6, 2022. 6-SER-

1320. Saliba alleged that he represented himself at the hearing because the "APA refused to defend [his] position" on the ground that "masking does not violate any of [his] rights." *Id.* At the end of the investigation, Saliba "was issued a directive to follow the company policy and the Federal mask mandate." 6-SER-1322.

Specifically, defendant Raynor issued a "written notice" that was placed in Saliba's employee file. *Id.*; 6-SER-1264. Saliba alleged that the written notice is "one step from termination" and that "[a]ny event involving a mask would be an immediate termination of his employment." 6-SER-1322. Saliba thereafter "followed the process outlined in the JCBA to have the notice removed from his file but to no avail." *Id*.

4. Saliba's claims.

After the federal mask mandate was vacated by a federal court on April 18, 2022, Saliba alleged that he was prepared to return to work. 6-SER-1323. Shortly thereafter, American placed Saliba on administrative leave with pay through May 2022, pending an evaluation of his fitness for duty.[3] *Id.*; 6-SER-1246, ¶10. He then initiated this action.

[3] The JCBA, in "Section 20 - Physical Examinations," allows for examinations of pilots up to twice per twelve month period without cause, and additionally at any time if "it is the Company's opinion that his health or physical condition is appreciably impaired" such that the pilot is not medically fit to fly. 6-SER-1251, § 20(D).

The District Court observed (3-SER-450) that it was "difficult to identify the particular claims" in Saliba's Complaint, but "construing the Complaint liberally," it identified the following causes of action:

(1) "violations of 'aviation law' by superseding or contradicting FAA regulations, dispatching flights illegally, and placing pilots, flight attendants, and passengers in danger based on the company mask policy," 3-SER-450 (citing 6-SER-1302-03, 1313-17, 1325);

(2) "hostile work environment based on Defendants' implementation of the policy," 3-SER-450 (citing 6-SER-1303, 1325);

(3) "defamation based on alleged implications during a disciplinary hearing that [Saliba] is a criminal," 3-SER-450 (citing 6-SER-1303, 1321, 1325);

(4) "violation of the [JCBA] … by refusing to provide [Saliba] certain documents, refusing to reschedule his disciplinary hearing, requiring him to submit to a 'fitness for duty' assessment, and wrongfully disciplining him," 3-SER-450 (citing 6-SER-1303, 1320, 1323, 1325); and

(5) "violation of his rights pursuant to 42 U.S.C. § 1983." 3-SER-450 (citing 6-SER-1326).

C. The district court dismisses Saliba's Complaint with leave to amend certain claims.

On July 1, 2022, Defendants moved to dismiss under Rules 12(b)(1), (b)(2), and (b)(6). 6-SER-1285. Defendants argued that Saliba's claims failed on several

grounds, including:

(1) lack of subject matter jurisdiction due to lack of standing (alleged violations of "aviation law"); mootness; Railway Labor Act ("RLA") preemption (alleged violations of the JCBA); and failure to exhaust administrative remedies (alleged hostile work environment);

(2) failure to state a claim because there are no private causes of action (alleged violations of "aviation law"); insufficient factual and legal bases for claims (hostile work environment, defamation, and 42 U.S.C. § 1983); and privilege (defamation); and

(3) lack of personal jurisdiction over defendants Long and Raynor. 6-SER- 1286, 1290-99.

Saliba opposed the motion, 4-SER-474, and Defendants replied. 3-SER-460.

On September 12, 2022, the District Court granted in part Defendants' motion. 3-SER-447. The court first concluded it had personal jurisdiction over defendant Raynor, but not over defendant Long. 3-SER-452-53.

Next, the court held that it lacked subject matter jurisdiction over Saliba's "aviation law" claims because "the Ninth Circuit has concluded, repeatedly and without equivocation, that [the Federal Aviation Act] does not create a private right of action." 3-SER-453 (citing *In re Mex. City Aircrash of Oct. 31, 1979*, 708 F.2d

400, 406–08 (9th Cir. 1983); *G.S. Rasmussen & Assocs., Inc. v. Kalitta Flying Servs., Inc.*, 958 F.2d 896, 901–02 (9th Cir. 1992); *Martin ex rel. Heckman v. Midwest Express Holdings, Inc.*, 555 F.3d 806, 808 (9th Cir. 2009)).

The court also dismissed the hostile work environment claim for lack of subject matter jurisdiction because Saliba "does not allege that he filed an administrative charge" with the EEOC. 3-SER-454. Likewise, the court held it lacked subject matter jurisdiction over claims based on alleged violations of the JCBA because they were preempted by the RLA. 3-SER-455-56.

The defamation cause of action failed to state a claim, the court held, because the alleged statements were privileged and not defamatory. 3-SER-454-55. Finally, the court determined that, because Saliba "failed to plead that Defendants were acting under the color of state law, his § 1983 claim must be dismissed for failure to state a claim." 3-SER-457-58.

The District Court held it was "absolutely clear" that Saliba could not "cure his claims based on aviation law (because the FAA does not give a private right of action) or the JCBA (because the RLA preempts claims for violations of the agreement)," and dismissed those claims without leave to amend. 3-SER-458. The court did, however, grant Saliba leave to amend with respect to his remaining claims. *Id.*

Saliba sought reconsideration, Dkt. 33, which was denied. Dkt. 34.

D. Saliba's amended complaints.

On October 10, 2022, Saliba filed a First Amended Complaint, alleging "breach of employment Contract, the hostile work environment and personal jurisdiction over Defendant Long," while purporting to "preserve[] the remaining claims in the original complaint." 3-SER-346. The District Court advised Saliba that he could not "preserve" claims in the superseded original Complaint, and would need to either file a second amended complaint or "proceed only as to the allegations in the First Amended Complaint." 3-SER-344.

On October 19, 2022, Saliba filed a Second Amended Complaint, adding allegations related to Chief Pilot Alison Devereux-Naumann. 3-SER-227-28. Six days later, Saliba filed the operative Third Amended Complaint, naming Devereux-Naumann as a defendant. 2-SER-84.

E. The operative Third Amended Complaint.

In the Third Amended Complaint, Saliba alleged the same basic facts concerning American's masking policy and the December 6, 2021 incident at Spokane airport, but also added a challenge to American's vaccination policy. 2-SER-85. He purported to assert four causes of action, and attached several exhibits to the TAC.[4] 2-SER-85-108, 113-214.

[4] Saliba identified the Exhibits as follows: Exhibit A – "Employment Contract." Exhibit B – "FAA documents." Exhibit C – "LOA 21-002." Exhibit D – "AA

(1) *Breach of contract*. Saliba alleged that "Defendants created and implemented a mandatory health-related company policy (Policy) that directly violated the employment Contract between [Saliba] and Defendant American that [he] rejected." 2-SER-85; 2-SER-175 (alleged mask policy).

The "employment contract," which Saliba attached to the TAC, comprised Saliba's employment application, hiring paperwork, and selected pages from manuals/policies relating to medical certificates. 2-SER-113-27. Saliba further alleged that the FAA medical certificate "is the cornerstone of the employment Contract with [American]," and that "[i]t is the pilot, and only the pilot, who can make [the] determination" regarding fitness to fly. 2-SER-87-89.

The American health policies that purportedly breached his "contract" were "facial masking" and "vaccination." 2-SER-89. Saliba's theory was that neither the federal regulations relating to pilot medical certification (14 CFR Part 67, including 14 CFR § 61.3(c)) nor the "Aeromedical Guide for AMEs (AME Guide)" reference masking, and that masking "interferes with the standards of issuance of an FAA medical certificate." 2-SER-87-88, 92.

With respect to the COVID-19 vaccine, he dismissed as "purely political and [detrimental]" the FAA's "waive[r] [of] their general practice of a one year waiting

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Documents." Exhibit E – "Defendant Long Exchange." Exhibit F – "VAERS Reports." Exhibit G – "Police e-mails report Spokane." 2-SER-112.

period after the final approval of a vaccine," and criticized the Letter of Agreement between his union and American regarding the vaccine. 2-SER-87-88, 90. He alleged the vaccination policy was "in violation of his Contract, primarily his authority in making health decision in accordance with the regulations and Public Policy." 2-SER-90.[5]

(2) *Hostile work environment.* Saliba alleged that "Defendants created and continue to create a hostile work environment and wrongfully invoked a disciplinary process reserved for disputes rooted in terms and conditions agreed to in Collective Bargaining Agreements (CBAs)." 2-SER-85.

Saliba also alleged that "American doubled down and immediately retaliated by demanding a fitness for duty examination" with a forensic psychiatrist. 2-SER-95. As the correspondence attached to the TAC shows, in April 2022, American withheld Saliba from service with pay pending a fitness for duty examination. 2-SER-160. American rescheduled the exam several times to accommodate Saliba. 2-SER-164. The day before the exam was ultimately set (August 19, 2022), Saliba called in sick. 2-SER-96. American then withheld Saliba from service without pay pending an investigation into Saliba's failure to appear for the appointment and

[5] Saliba admitted he "did not request any accommodations" or exemptions from the vaccination policy because "he did not feel he needed to." 2-SER-95:6-7.

possible abuse of sick leave. *Id.*; 2-SER-165. Saliba has been removed from flight status since December 6, 2021. 2-SER-108.

Saliba did not attribute the alleged "hostile environment" to any Title VII-protected characteristic. Instead, he alleged he "is being targeted by the Defendants and he can only conclude that every one of Defendants actions is calculated to exert maximum pressure to force [Saliba] into submission and surrendering his authority over his medical Certificate." 2-SER-97:14-16; 2-SER-93:16-17, 94:16-17 (he "feels he is being targeted for refusing to accept an amendment to his employment contract," and "Defendant Raynor willfully conducted the [Section 21] hearing to discipline [Saliba] and coerce him into accepting an amendment to his Contract.").

(3) *Section 1983.* Saliba alleged that "Defendants became State actors by their actions following the event of December 6, 2021, violating [his] constitutional rights, namely his Fourteenth Amendment rights." 2-SER-85. In particular, Saliba alleged that, on that day, "Defendants[']] interests and that of the police officers at the Spokane International Airport aligned, that is enforce the facial masking on [Saliba] at any cost and protect the travel service provided by the airline." 2-SER-101:9-12.[6]

[6] Saliba attached to the TAC a document purporting to be the police report from the December 6, 2021 incident. The document reflects that the airport police "told him he needed to wear a mask in the airport," and Saliba responded that he "does

As proof of alleged state action, Saliba relied on an email (attached to the TAC) purportedly sent by the police to American the day after the incident, providing the incident report number and advising American how it could obtain the police report and body camera footage. 2-SER-101; 2-SER-210. American then allegedly "reciprocated and unnecessarily invoked disciplinary measures" against Saliba. 2-SER-101-02.

(4) "*Aviation law.*" Although dismissed without leave to amend, Saliba purported to reassert "aviation law" claims, alleging that the FAA "is nonresponsive and unwilling to uphold its mission of aviation safety." 2-SER-103, 107.[7] With its masking and vaccination policies, American purportedly was "complicit," by "disregarding [Saliba's] authority over health decisions he makes in maintaining a valid FAA issued medical Certificate." *Id.*

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not have to wear the mask." 2-SER-213. "During [the] time he was in the airport," the document continues, "he never once put on his mask despite being asked to do so. He was completely defiant and was not going to put on a mask because he felt he did not think he needed to." *Id.*

[7] As an example, Saliba pointed to a January 5, 2022 letter he received from the Chief Medical Officer of the FAA, stating that "[the] requirement to wear a face covering in public transportation areas, including a commercial airport, is determined by Presidential Executive Order. Refusing to wear a mask in or on the airport is a violation of Federal law." 2-SER-143. In one of his responses to the FAA, Saliba maintained that "[t]he mask is nothing more than virtue signaling that the enemies of the United Stated of America are using to destroy our Republic." 2-SER-148. Saliba attached these letters to the Third Amended Complaint. *Id.*

In his prayer for relief, Saliba requested, among other things, reinstatement to flight status; expungement of any record of insubordination or violation of company policy; an order prohibiting American from enforcing any masking or vaccination policy against Saliba; and compensatory and punitive damages. 2-SER-108-09.

F. Defendants move to dismiss the Third Amended Complaint

On November 8, 2022, Defendants moved to dismiss the Third Amended Complaint under Rules 12(b)(1), (b)(2), and (b)(6). 2-SER-68.

First, Defendants pointed out, Saliba impermissibly realleged claims for violation of "aviation law," which had been dismissed without leave to amend. 2-SER-70, n. 1.

Second, Defendants argued that the breach of contract claim failed because Saliba did not "identify a legally valid contract," but even if he had, no document "prohibit[ed] American from (1) instating mask and vaccine policies for its employees, or (2) requiring [him] to adhere to those policies." 2-SER-70.

Third, the section 1983 claim failed, Defendants argued, because Saliba once again failed to adequately allege "that American (or any Defendant) was acting under color of law." *Id.*

Fourth, Defendants argued that the hostile work environment claim failed because "he has not identified a protected characteristic upon which the claim is purportedly based and he has not exhausted his administrative remedies." *Id.*

Finally, Defendants argued that Saliba had not alleged facts sufficient to establish personal jurisdiction over previously-dismissed defendant Long. *Id.*

Saliba opposed the motion, 2-SER-32, and Defendants replied. 2-SER-23.

G. The District Court dismisses the Third Amended Complaint with prejudice.

The District Court granted Defendants' motion. 1-SER-3. *First*, the court held that it could exercise personal jurisdiction over defendant Long because of his alleged contacts with Arizona—"(1) he responded to an email from [Saliba], and (2) he held an appeal hearing for [Saliba] using videoconference." 1-SER-7-9.

Second, with respect to the breach of contract claim, the court "assume[d] without deciding that [Saliba] has sufficiently alleged that the attached employee handbook and flight operations manuals are contractual," but that Saliba's "failure to allege a breach of any of the terms contained therein—or elsewhere—is dispositive" of the claim. 1-SER- 9-10. To the extent the operations manual required pilots "to maintain a current medical certificate," the court reasoned that "[t]hese terms plainly impose obligations on [Saliba], not Defendants." 1-SER-10. As such, the court held, "American's implementation of a mask policy simply does not violate these terms." *Id.*

Saliba's arguments to the contrary, the court continued, were "utterly baseless": Saliba "has not established any contractual term that would prevent American from imposing additional requirements, such as its mask and vaccination policies, even if [he] believed those requirements would affect his certificates." *Id.*

Third, with respect to the hostile work environment claim, the District Court held that while "the TAC does not plead exhaustion" and "makes no mention of an EEOC charge," it would not dismiss on that basis because Saliba attached a right-to-sue letter to his response to the motion to dismiss. 1-SER-11-12.

Instead, addressing the merits, the court held that Saliba "fails to state a claim because he does not allege that he experienced harassing conduct based on his national origin." 1-SER-12 (emphasis added). At most, the TAC attached a *police report* that identified Saliba "as a Middle Eastern individual under race," but this provided "no basis on which to infer that any Defendant took any action against [Saliba] because of his national origin." *Id.* Saliba's own allegations, the court further noted, indicated he was "'targeted for refusing to accept an amendment to his employment contract,'" which was "not a protected characteristic under Title VII." *Id.*

Fourth, the District Court held that "[Saliba] has failed to plead that Defendants were acting under color of state law," requiring dismissal of his § 1983

claim. 1-SER-15. Carefully analyzing each of the four tests for identifying state action, the court reasoned:

(1) *Public function*: Saliba "does not allege any specific government power that was delegated [to American]; rather, the allegations make clear that American was enforcing its own mask policy using its own disciplinary procedures." 1-SER-14.

(2) *Joint action:* Saliba failed to explain how American's "use of its disciplinary process in response to [his] noncompliance with company policy and federal law amounted to unconstitutional behavior with benefits knowingly accepted by the Spokane Police." *Id.*

(3) *Governmental compulsion:* neither the police department's "mere provision of factual information" to American (*i.e.*, the December 7, 2021 email) nor "any other contact alleged between the police and American in the TAC … amounts to coercion or significant encouragement." 1-SER-14-15.

(4) *Governmental nexus*: "given the relatively minimal contact between the airport police and American, there is no such nexus." 1-SER-15.

Fifth, addressing the "aviation law" claims, the District Court reiterated what it said in its first dismissal order and in its order denying reconsideration: "there is no private right of action under the Federal Aviation Act or its associated regulations." 1-SER-15.

Finally, the District Court denied Saliba leave to amend, concluding that he "has had ample opportunity to amend his complaint and has repeatedly failed to state a plausible claim for the same or similar reasons." *Id.*

SUMMARY OF ARGUMENT

The order dismissing Saliba's operative Third Amended Complaint (TAC) with prejudice must be affirmed in its entirety.

1. Saliba's breach of contract cause of action fails to state a claim for several independent reasons. First, Saliba did not plausibly allege the existence of any "employment contract" with American, other than the JCBA. Second, even if the assorted documents Saliba relied on comprised an "employment contract," nothing therein prevented American from enforcing masking and vaccination requirements. And to the extent Saliba's claim challenged American's disciplinary process or any requirements set forth in the JCBA, the claim is preempted by the Railway Labor Act. *See* Part I.

2. Saliba's "aviation law" claim fails because, under this Court's settled precedents, neither the Federal Aviation Act nor its regulations establish a private right of action. Saliba concedes as much in his opening brief, but urges this Court to nevertheless provide him with a remedy because he desires one. That is beyond the Court's authority. *See* Part II.

3. Saliba's section 1983 claim fails because it does not plausibly allege that, by enforcing American's private policies and utilizing the procedures under the JCBA, Defendants acted "under color of state law." The fact that Spokane police informed American how to obtain the police report did not transform American into a state actor when it subsequently addressed the Spokane airport incident with Saliba in its capacity as a private employer. *See* Part III.

4. Saliba's "hostile work environment" claim fails because, according to his own allegations, "every one of Defendants actions" was taken "to force [Saliba] into submission and surrender[] his authority over his medical Certificate," 2-SER-97—not because of his national origin. *See* Part IV.

Finally, the District Court was well within its discretion to deny Saliba further leave to amend his Third Amended Complaint. The court reasonably concluded that Saliba "has had ample opportunity to amend his complaint and has repeatedly failed to state a plausible claim for the same or similar reasons," such that "the deficiencies of the TAC cannot be cured." 1-SER-15.

STANDARDS OF REVIEW

1. ***12(b)(6) motion.*** This Court "review[s] de novo the district court's decision to grant [a defendant's] motion to dismiss under Federal Rule of Civil Procedure 12(b)(6)." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025,

1030 (9th Cir. 2008). "Denial of leave to amend is reviewed for an abuse of discretion." *Id.* at 1031.

To survive a motion to dismiss, the complaint must contain a cognizable legal theory, *Balisteri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988), and "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotations omitted).

"Determining whether a complaint states a plausible claim for relief will … be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. "But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id.* (quoting Fed. R. Civ. Proc. 8(a)(2)).

The rules "demand[] more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678. "Nor does a complaint suffice if it tenders naked assertion[s] devoid of further factual enhancement." *Id.* (quotations omitted). Further, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*; *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (courts "are not bound to accept as true a legal conclusion couched as a factual allegation").

2. ***12(b)(1) motion.*** "Dismissal for lack of subject matter jurisdiction is reviewed de novo." *Ass'n of Am. Med. Colleges v. United States*, 217 F.3d 770, 778 (9th Cir. 2000). "The district court's findings of fact relevant to its determination of subject matter jurisdiction are reviewed for clear error." *Id.*

"For motions to dismiss under Rule 12(b)(1), unlike a motion under Rule 12(b)(6), the moving party may submit

> affidavits or any other evidence properly before the court.... It then becomes necessary for the party opposing the motion to present affidavits or any other evidence necessary to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction. The district court obviously does not abuse its discretion by looking to this extra-pleading material in deciding the issue, even if it becomes necessary to resolve factual disputes."

Id. (quoting *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989)).

ARGUMENT

I. Dismissal of the Breach of Contract Claim Must Be Affirmed Because Saliba Did Not Plausibly Allege the Existence or Breach of any Contract

"[T]he elements of a breach-of-contract claim are: (1) the existence of a contract; (2) breach; and (3) resulting damages." *First Am. Title Ins. Co. v. Johnson Bank*, 239 Ariz. 348, 353 (2016). Saliba failed to state facts supporting either the existence of an employment contract or any breach.

A. Saliba did not plead the existence of a contract.

While the District Court "assumed without deciding" that a handbook and flight operations manual "are contractual," this Court may affirm dismissal on the ground that no contract (other than the JCBA) governs here.

First, Saliba failed to allege or attach any document constituting an employment contract between him and American. The documents comprising Saliba's alleged "employment contract" (attached as Exhibit A to the TAC) are an assortment of application and hiring materials, and selected pages from a handbook and flight operations manual. 2-SER-113-27. But the employment application explicitly states that "neither this Employment Application nor any other America West documents are contracts of employment." 2-SER-117. The "other America West documents" would include the Handbook and flight operations manual on which Saliba relies. 2-SER-122-23. Further, the Handbook acknowledgment form makes no contractual promise and advises that its contents are "subject to change." 2-SER-122. As such, these documents do not contain any enforceable contractual promises.

Nor do these documents—or the more recent American flight operations manual Saliba includes in Exhibit A (2-SER-124-27)—contain any terms that prevent American from implementing masking and vaccination requirements. The documents explain that (as required by federal law) *Saliba* has an obligation to

maintain a valid medical certificate in order to fly as a pilot. *See e.g.* 2-SER-124 ("Flying with a less than first class medical certificate, even though you received the correct examination, is still a violation of the [Federal Airline Regulations] and [Flight Operations Manual]. You must have a first class medical certificate in your possession each time you fly.").

But no language in these documents prevents American from enforcing vaccination and masking requirements, or from complying with federal mandates. Nor does anything in these documents give Saliba the right to ignore American's masking and vaccination policies. In short, the documents create no contractual rights that American breached.[8]

Second, Saliba relies on an alleged contract "with The People," presumably referring to the federal regulations he cites in his brief and TAC. AOB-2-6 (citing 14 C.F.R. § 61.53). Saliba cannot convert a federal regulation into a contractual term between himself and American. *See e.g. Metrophones Telecom., Inc. v. Glob. Crossing Telecommunications, Inc*., 423 F.3d 1056, 1076 (9th Cir. 2005) ("state

[8] Saliba belatedly tried to assert a breach of contract claim in a second lawsuit against American based on yet another contract—specifically, a 2005 settlement agreement between him and America West Airlines. *Saliba v. American Airlines, Inc.*, No. 2:23-CV-00140-SPL. American has moved to dismiss that second suit on several grounds, including: (a) American has not breached this alleged contract, and (b) the second suit is claim-precluded because Saliba could have—but failed to—assert that theory in this lawsuit. The district court's resolution of Saliba's second suit has no bearing on this appeal.

contract law, not the federal regulations, would govern the resolution of contract-related questions, such as whether a contract was formed, what terms the parties agreed to, and whether the contract was breached."). His reliance on federal regulations to establish a phantom contract with American is, in actuality, a back-door attempt to assert "aviation law" claims, which were properly dismissed. *See* Part II, below.

Finally, Saliba cannot escape federal preemption. A contract *does* exist that governs the terms and conditions of Saliba's employment—the JCBA. Saliba's contention that he had a contractual right to make final decisions about whether to follow American's vaccination and masking policies would fall squarely within the ambit of the JCBA and would be preempted by the Railway Labor Act ("RLA"). *See, e.g., Hawaiian Airlines v. Norris*, 512 U.S. 246 (1994) (disputes over interpretation or application of a labor contract must be decided under the RLA's mandatory dispute-resolution mechanisms and not by federal courts).

That is because, in order to resolve Saliba's breach of contract claim, a court would need to interpret the JCBA to determine whether its terms override Saliba's alleged contractual right to determine his own fitness to fly. Among the JCBA terms implicated would be Section 20, which governs questions related to Saliba's medical fitness to fly for American. Further, as his own submissions concede, the

vaccination requirements for pilots are the subject of a negotiated Letter of Agreement between the union and American. 2-SER-152-54.

As such, even if anything in Exhibit A could constitute an "employment contract," resolution of his breach of contract claim unavoidably would require interpretation of the JCBA, thus preempting the claim and depriving the court of subject matter jurisdiction.

B. Saliba did not plausibly allege any breach.

The District Court correctly held that Saliba "has not established any contractual term that would prevent American from imposing additional requirements, such as its mask and vaccination policies, even if [he] believed those requirements would affect his certificates." 1-SER-9.

As explained above, none of the documents in Exhibit A prevented American from establishing masking and vaccination policies or complying with federal mandates. 2-SER-113-27. Indeed, American's vaccination requirements for pilots were negotiated with the union and embodied in a Letter of Agreement. 2-SER-152-54. No contract prohibited American from enforcing its company policies or granted Saliba the unilateral right to determine which American policies to follow. As such, American breached no contract when it held Saliba to the same standards as it holds every other American pilot.

The federal regulations, moreover, do not forbid airline vaccination and masking policies. 14 C.F.R. § 61.53(a) simply prohibits pilots from acting as a "pilot in command" when they know or have reason to know of a condition that would render then "unable to meet the requirements for the medical certificate…."[9] The regulation does not state that a pilot has a unilateral say over all matters that, in the pilot's view, might impact their fitness to fly. In fact, in a separate lawsuit Saliba filed against the union, the district court rejected that position, noting that "Saliba's interpretation of [14 C.F.R.] §§ 61.53 is idiosyncratic and almost certainly incorrect." *Saliba v. Allied Pilots Ass'n*, 2023 WL 2648141, at *3 (D. Ariz. Mar. 27, 2023). "Nothing in this section," the district court held, "even arguably gives Saliba the unilateral authority to decide whether to comply with a mask mandate policy, especially when that policy did not require him to wear a mask while actually piloting the airplane from the flight deck." *Id.*

The regulations also do not state that an airline is unable to impose additional health and safety requirements on a pilot.[10] Federal laws, in fact, compelled airlines to comply with airport masking requirements and the

[9] 14 C.F.R. § 61.53(a) is reproduced in the Addendum attached hereto.

[10] And even if Saliba could show that masking while in an airport created a disqualifying medical condition for him, this regulation would (at most) require Saliba to refrain from flying. It would not prohibit American from implementing and enforcing vaccine, masking, or other health and safety-related policies.

vaccination mandates applicable to federal contractors. *See e.g.* Exec. Order No. 13998, 86 Fed. Reg. 7205 (Jan. 26, 2021) (Promoting COVID-19 Safety in Domestic and International Travel); Exec. Order No. 14042, 86 Fed. Reg. 50,985 (Sept. 9, 2021) (Ensuring Adequate COVID Safety Protocols for Federal Contractors); Safer Federal Workforce Task Force, *COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors* (Sept. 24, 2021).[11]

The District Court thus correctly concluded that Saliba failed to plausibly allege that American's masking and vaccination policies breached any contract between the parties.

C. Saliba fails to establish reversible error.

The various contentions in Saliba's opening brief fall far short of establishing reversible error.

First, Saliba asserts that "American cannot create a new medical standard by which they operate" that departs from FAA regulations. AOB-8. In a similar vein, he argues that American cannot impose policies in addition to those embodied in federal law and "Public Policy." AOB-8-10. Saliba is thus arguing that American violated federal aviation law, *not* that it breached any contract. As such, his

[11] Available at www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf.

position fails twice—first, because federal aviation law provides no private right of action, and second, because he has failed to identify any breach of contract. Further, Saliba cites no authority to suggest that federal law or "public policy" are exclusive and occupy the field, prohibiting airlines from enforcing masking and vaccination policies.

Second, Saliba points out that the flight operations manual makes it the "pilot's responsibility" to maintain his medical clearance and be fit for duty. AOB-11-12, 13 ("AA is not in a position to assume my responsibility."). But American is not trying to assume Saliba's responsibility. Nothing in the manual prevents American from imposing *its own* masking and vaccination requirements. In other words, pilots can be responsible for maintaining their medical clearance while also being subject to their employer's policies.

Third, Saliba argues that American breached the alleged contract by placing him on administrative leave and "imposing unlawful discipline." AOB-15-16, 26 (American "has weaponized a joint collective bargaining agreement (JCBA) in retaliation for my position of disagreement with [American]"). Saliba thus squarely challenges the procedures and discipline prescribed by the JCBA—an effort preempted by the RLA.[12] *Edelman v. Western Airlines, Inc.*, 892 F.2d 839, 843

[12] Saliba has not challenged the district court's ruling that the RLA preempted the JCBA-based claims in his original complaint. 3-SER-455-56.

(9th Cir. 1989) (wrongful discipline claims are "disputes which are inextricably intertwined with the grievance machinery of the collective bargaining agreement and of the RLA, [and] the exclusive jurisdiction of the [arbitration board] preempts the claims.") (quotations and citations omitted).

In sum, Saliba's effort to establish the breach of any contractual obligation fails on multiple fronts. He cannot assert a breach of the JCBA due to RLA preemption. He has failed to identify any other contract between him and American, let alone one that prohibits enforcement of vaccination and masking policies. Nor can he use contract law as an end-run around the fact that federal aviation regulations do not authorize a private right of action. Dismissal of his breach of contract claims must be affirmed under Rules 12(b)(1) and/or (b)(6). And because the District Court granted Saliba multiple opportunities to assert a viable claim, it did not abuse its discretion in denying leave to amend. *Chodos v. W. Publ'g Co.*, 292 F.3d 992, 1003 (9th Cir. 2002) ("when a district court has already granted a plaintiff leave to amend, its discretion in deciding subsequent motions to amend is particularly broad.") (quotations omitted).

II. Dismissal of the "Aviation Law" Claims Must be Affirmed Because Those Laws Authorize No Private Right of Action

The District Court dismissed Saliba's "aviation law" claims because "the Ninth Circuit has concluded, repeatedly and without equivocation, that [the Federal

Aviation Act] does not create a private right of action." 3-SER-453; 1-SER-15. Its ruling must be affirmed.

This Court has "previously held that there is no implied private right of action under the Federal Aviation Act." *G.S. Rasmussen & Assocs., Inc. v. Kalitta Flying Serv., Inc.*, 958 F.2d 896, 902 (9th Cir. 1992) (citing *Montgomery v. American Airlines, Inc.*, 637 F.2d 607, 609–10 (9th Cir. 1980)); *Air Transp. Ass'n of Am. v. Pub. Utilities Comm'n of State of Cal.*, 833 F.2d 200, 207 (9th Cir. 1987).

That is so "particularly where plaintiff's claim is grounded in the regulations rather than the statute itself." *G.S. Rasmussen*, 958 F.2d at 902; *accord Bonano v. E. Caribbean Airline Corp.,* 365 F.3d 81, 86 (1st Cir. 2004) ("it is abundantly clear that Congress, in crafting the [Federal Aviation] Act, intended public, not private, enforcement. Consequently, we join a long list of other courts that have concluded that neither the Act nor the regulations create implied private rights of action.").[13]

Here, Saliba's "aviation law" claim alleges that American violated certain Federal Aviation Act regulations—namely, 14 C.F.R. § 61.53 and § 121.417. 2-

[13] *See also Montauk-Caribbean Airways, Inc. v. Hope*, 784 F.2d 91, 97 (2d Cir. 1986); *Wolf v. Trans World Airlines, Inc.*, 544 F.2d 134, 136–38 (3d Cir. 1976); *Schmeling v. NORDAM*, 97 F.3d 1336, 1344 (10th Cir. 1996); *Shapiro v. Lundahl*, 2017 WL 895608, at *2 (N.D.Cal. Mar. 7, 2017) ("the FAA regulations do not create a private right of action"); *Schneider v. Amador Cty.*, 2011 WL 3876015, at *3 (E.D. Cal. Sept. 1, 2011) ("plaintiff cannot proceed with a private right of action under the" FAA).

SER-103-07. Elsewhere in his TAC, Saliba broadly cites other Federal Aviation Act regulations (14 C.F.R. Parts 67 and 117) with which American purportedly did not comply. 2-SER-86-108. Under the Court's settled precedents cited above, Saliba cannot pursue a private right of action based on these regulations.

Saliba concedes as much. AOB-21 ("the statute does not expressly provide a remedy"); AOB-25 ("There is no stated right or remedy under the Act for forced medical treatment"). He nevertheless urges the Court to create "new case law," AOB-16, because "the only place for remedy is the Court and an implied right of action under aviation law violation is appropriate." AOB-26.

But Saliba does not, as he must, establish any authorization for such a remedy in the Federal Aviation Act. *Opera Plaza Residential Parcel Homeowners Ass'n v. Hoang*, 376 F.3d 831, 835 (9th Cir. 2004) ("The burden is on the plaintiff seeking to establish that a private right of action exists."). He points to no provision in the Act or its legislative history that reveals a Congressional "inten[t] to protect" pilots from vaccination or masking policies or an "intent to create … a private remedy." *Montgomery*, 637 F.2d at 609; *In re Mexico City Aircrash of Oct. 31, 1979*, 708 F.2d 400, 407 (9th Cir. 1983) ("Because of the [Federal Aviation] Act's emphasis on administrative regulation and enforcement, we conclude that it is highly improbable that 'Congress absentmindedly forgot to mention an intended private action.") (quotations omitted).

Nor does he explain how such a private remedy would "be consistent with the legislative goals" of the Act. *Montgomery*, 637 F.2d at 609. On the contrary, he admits that the "FAA … is not authorized to pursue individuals or corporations who force a treatment." AOB-26. His argument thus boils down to this: the Court should provide a remedy because "as the beneficiary [of the Act] I must find remedy." AOB-25-26; AOB-26 ("I must find remedy in other forums, and in this case the Courts."). But even when "a federal statute has been violated and some person harmed," that "does not automatically give rise to a private cause of action in favor of that person." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979) (quotations omitted).[14]

In the absence of any explicit or implicit authorization in the Act, this Court cannot grant Saliba relief simply because he wants it. And because the claim fails as a matter of law, the District Court was within its discretion to deny leave to amend. *Leadsinger, Inc. v. BMG Music Pub.*, 512 F.3d 522, 532 (9th Cir. 2008) (refusing leave to amend when claim "could not be saved by any amendment.").

[14] Saliba relies on a Fifth Circuit decision from 1953 to argue for a private right of action. But *Laughlin v. Riddle Aviation Co.*, 205 F.2d 948, 949 (5th Cir. 1953) is distinguishable—it permitted a pilot to recover compensation that was specifically prescribed under the Civil Aeronautics Act of 1938, 49 U.S.C.A. § 481(1)(2). The Federal Aviation Act, in contrast, does not prescribe any relief for airline masking or vaccination policies. In addition, this Court specifically contrasted *Laughlin* with its own precedents, suggesting that this Circuit would not follow the reasoning in *Laughlin. In re Mexico City Aircrash,* 708 F.2d at 408, n.12.

III. Dismissal of the Section 1983 Claim Must Be Affirmed Because Saliba Did Not Plausibly Allege State Action

The District Court held that, "[b]ecause [Saliba] has failed to plead that Defendants were acting under color of state law, his § 1983 claim must be dismissed." 1-SER-15. The ruling must be affirmed.

A. State action under Section 1983.

"To state a claim under § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of State law." *Long v. County of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2006). "While generally not applicable to private parties, a § 1983 action can lie against a private party when he is a willful participant in joint action with the State or its agents." *Kirtley v. Rainey*, 326 F.3d 1088, 1092 (9th Cir. 2003) (quotations omitted). "Only in rare circumstances can a private party be viewed as a 'state actor' for section 1983 purposes." *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835 (9th Cir. 1999) (quoting *Harvey v. Harvey*, 949 F.2d 1127, 1130 (11th Cir. 1992)).

This Court uses four tests "to identify state action: (1) public function; (2) joint action; (3) governmental compulsion or coercion; and (4) governmental nexus." *Kirtley*, 326 F.3d at 1092 (quotations omitted). "[N]o one fact can function as a necessary condition across the board ... nor is any set of circumstances

absolutely sufficient, for there may be some countervailing reason against attributing activity to the government." *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295–96 (2001).

B. Saliba can allege no set of facts establishing that Defendants acted under color of state law.

In the Third Amended Complaint, Saliba's central theory was that, "[o]n December 6, 2021, the Defendants['] interests and that of the police officers at the Spokane International Airport aligned, that is enforce the facial masking on [Saliba] at any cost and protect the travel service provided by the airline." 2-SER-101. He alleged a "symbiotic relationship" between the police and American, relying on the following: the police "notif[ied] Tony, the AA gate agent on duty on December 6, 2021" about Saliba's refusal to wear a mask; the police then "follow[ed] up with more information" by sending American an email (attached to the TAC) on December 7, providing the incident report number and advising American how it could obtain the police report and body camera footage; and American "reciprocated" by "unnecessarily invok[ing] disciplinary measures." 2-SER-101-02; 2-SER-210.

Saliba also alleged, inconsistently, that the police "offered assistance and encouragement in the persecution of the plaintiff," but at the same time "acquiesced" to American by not detaining him "in favor of an on-time departure" of the flight Saliba ultimately piloted to Dallas. 2-SER-102. Also inconsistently,

Saliba alleged that American "jointly" with the police "intended on forcing [Saliba] to use facial masking," but acknowledges that the police released him to walk to his Dallas flight unmasked. *Id*.

As the District Court correctly held, Saliba's allegations satisfy none of the four tests for state action.

1. Public function

"Under the public function test, when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." *Lee v. Katz*, 276 F.3d 550, 554-55 (9th Cir. 2002) (quotations omitted). "The public function test is satisfied only on a showing that the function at issue is 'both traditionally and exclusively governmental.'" *Kirtley*, 326 F.3d at 1092 (quoting *Lee*, 276 F.3d at 555).

Saliba's TAC identified no "traditionally and exclusively governmental" function" that American exercised. Rather, Saliba alleged that American—a private employer—disciplined him pursuant to the procedures in *its own* JCBA for refusing to abide by *its own* masking policies. Under this Court's precedents, American's actions as a private employer are not governmental functions. *See e.g. George v. Pac.-CSC Work Furlough*, 91 F.3d 1227, 1231 (9th Cir. 1996) (affirming dismissal of employee's complaint alleging section 1983 claim against

his employer, a private correctional facility, because facility did not "'become the government,' … for employment purposes").

The only governmental function Saliba identifies is his initial detention by the TSA and Spokane police—actions in which American had no involvement, and about which American had no prior knowledge. Further, Saliba's argument that American was "aligned with the governmental and public agencies policies" with respect to masking (AOB-29) does not transmute its purely private policy into a public function. Saliba's claim thus fails the public function test.

2. Joint action

"Under § 1983, a claim may lie against a private party who 'is a willful participant in joint action with the State or its agents.'" *DeGrassi v. City of Glendora*, 207 F.3d 636, 647 (9th Cir. 2000) (quoting *Dennis v. Sparks*, 449 U.S. 24, 27–28 (1980)). "However, a bare allegation of such joint action will not overcome a motion to dismiss; the plaintiff must allege 'facts tending to show that [defendants] acted 'under color of state law or authority.'" *DeGrassi*, 207 F.3d at 647 (quoting *Sykes v. State of Cal.*, 497 F.2d 197, 202 (9th Cir. 1974)).

"A private party is liable under this theory … only if its particular actions are 'inextricably intertwined' with those of the government." *Brunette v. Humane Soc'y of Ventura Cnty.*, 294 F.3d 1205, 1211 (9th Cir. 2002) (dismissing

complaint; law enforcement inviting media to observe execution of warrant insufficient).

Here, Saliba's own allegations show that, far from being "inextricably intertwined," American and the Spokane police operated independently and in their own domains. The Spokane police, upon being summoned by the TSA, detained Saliba for not complying with the federal mask mandate but ultimately decided to let him go. American, upon being informed of the incident, conducted an internal investigation and hearing in accordance with its JCBA to determine whether Saliba complied with company policies. 2-SER-101-03; 2-SER-210.

American did not call the police or press them to prosecute Saliba. On the contrary, according to Saliba's own allegations, American did not know about the incident until police had already detained Saliba, and police let him go to enable "an on-time departure" of his American flight.[15] 2-SER-102; *Radcliffe v. Rainbow Const. Co.*, 254 F.3d 772, 783 (9th Cir. 2001) (no joint action where "the alleged interference with the plaintiffs' Fourth Amendment rights arose from arrests that

[15] In his opening brief, Saliba asserts that American "wanted an on-time departure and communicated to the police, who then relented in favor of an on-time departure for [American] and allowed me through without covering my nose and mouth." AOB-27. Even assuming that were true, American's alleged intervention to *prevent* his further detention shows the opposite of joint action and governmental compulsion.

were perfected before anyone from [private defendant] had met with [prosecutor].").

But even if American had called the police or encouraged them to prosecute Saliba, that would not suffice to constitute "joint action." *See e.g. Hodges v. Holiday Inn Select*, 2008 WL 1945532, at *3 (E.D.Cal. May 1, 2008), report and recommendation adopted, 2008 WL 2477615 (E.D.Cal. June 16, 2008) ("It is well settled that calling the police for assistance does not convert a private party into a state actor") (collecting cases); *Radcliffe*, 254 F.3d at 783-84 (no state action where private defendant "went to the District Attorney's office to inquire why the earlier arrests had not led to prosecutions"; "[t]his unremarkable exchange between a complaining citizen and a prosecutor does not amount to a conspiracy to deprive the plaintiffs of their Fourth Amendment rights").

Nor does the TAC plead facts showing that "the state knowingly accept[ed] the benefits derived from unconstitutional behavior." *Kirtley*, 326 F.3d at 1093. Saliba alleges that "the Defendants jointly with the Spokane police carried on what the police had started, a benefit the police were intending on receiving, lawfully or unlawfully is immaterial here, they intended on forcing [him] to use facial masking." 2-SER-102. As the District Court correctly held, however, the TAC is devoid of facts explaining "how American's … use of its disciplinary process in response to [Saliba's] noncompliance with company policy and federal law

amounted to unconstitutional behavior with benefits knowingly accepted by the Spokane Police." 1-SER-14.

3. Compulsion

"The compulsion test considers whether the coercive influence or 'significant encouragement' of the state effectively converts a private action into a government action." *Kirtley*, 326 F.3d at 1094. In his opening brief, Saliba argues that police were "pressing AA for further action" after the December 6 incident.

In the TAC, Saliba alleges that "[t]he Police compelled the Defendants to pursue [Saliba]" by notifying American of the December 6 incident, and emailing American on December 7 with information on how to obtain the police report and body camera footage. 2-SER-102; 2-SER-210. But these facts do not even suggest that the police encouraged—let alone compelled—American to conduct its own private disciplinary investigation.

Rather, the police merely provided information to American and offered to explain "why charges where not sanctioned on this individual." 2-SER-210; 2-SER-211 (email from police alerting American that TSA prepared a separate report that American should consider "*if* investigated") (emphasis added). The police report, moreover, makes no reference to any cooperation or coordination with (much less compulsion of) American in connection with the police's handling of the December 6 incident. 2-SER-213.

Saliba fails to allege anything that would plausibly suggest that American enforced its policies or conducted its private disciplinary proceedings due to state compulsion. *See e.g. George v. Pac.-CSC Work Furlough*, 91 F.3d 1227, 1232 (9th Cir. 1996) ("Nothing in [plaintiff's] complaint suggests that state law or custom forced [private employer] to discharge him.").

Saliba also argues that the police and American both "benefited from the CARES act federal monies and forcing everyone, including pilots, to comply [with masking] assured both the flow of funding." AOB-31. But he cites no authority to support that the receipt of state funds suffices to transform a private company into a state actor. *Anderson v. United Airlines, Inc.*, 577 F.Supp.3d 1324, 1329 (M.D. Fla. 2021) (plaintiff asserted that United "required vaccination following governmental signals" and that "government loans and grants encouraged United" to enforce the government's vaccine mandate; district court held that plaintiff "d[id] not plausibly allege that United is a state actor").

Finally, to the extent Saliba's claims are premised on American's compliance with TSA Security Directives, Executive Orders, or Federal Aviation Act regulations, that is insufficient to impose private liability under section 1983. *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 838 (9th Cir. 1999) ("the mere fact that the government compelled a result does not suggest that the government's action is 'fairly attributable' to the private defendant."). "To accept

[Saliba's] argument would be to convert every employer—whether it has one employee or 1,000 employees—into a governmental actor every time it complies with a presumptively valid, generally applicable law." *Id.*

4. Governmental nexus.

This test "asks whether there is such a close nexus between the State and the challenged action that the seemingly private behavior may be fairly treated as that of the State itself." *Kirtley*, 326 F.3d at 1094–95. Courts consider "whether the state has 'so far insulated itself into a position of interdependence with the [private actor] that it must be recognized as a joint participant in the challenged activity." *Franklin v. Fox*, 312 F.3d 423, 445 (9th Cir. 2002).

The police and American were not interdependent, but rather, responded separately to Saliba's actions on December 6, 2021. American had no role in police's detention of Saliba at the TSA checkpoint, just as the police had no role in American's private hearing and disciplinary process under the JCBA. The mere fact that the police communicated with American about the incident and may have had parallel objectives (compliance with masking requirements) does not make American a state actor. *George*, 91 F.3d at 1231 (no "nexus" where plaintiff identified "no County or state regulation of [defendant]-initiated employment termination or disciplinary processes").

Because Saliba failed to plead a viable section 1983 claim despite multiple opportunities, the District Court's dismissal of the claim without leave to amend was not an abuse of discretion.

IV. Dismissal of the Hostile Work Environment Claim Must Be Affirmed Because Saliba Never Alleged Any National Origin-Based Conduct

A. Saliba's own allegations defeat his claim.

The District Court held that Saliba "fails to state a claim because he does not allege that he experienced harassing conduct based on his national origin." 1-SER-12. The ruling must be affirmed.

Title VII prohibits discrimination "against any individual with respect to his compensation, terms, conditions or privileges of employment because of his race, color, religion, sex, or national origin." *Vasquez v. County of Los Angeles*, 349 F.3d 634, 642 (9th Cir. 2003). To state a hostile work environment claim based on national origin, a plaintiff must allege "(1) that he was subjected to verbal or physical conduct because of his national origin; (2) that the conduct was unwelcome; and (3) that the conduct was sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and create an abusive work environment." *Kang v. U. Lim Am., Inc.*, 296 F.3d 810, 817 (9th Cir. 2002) (quotations omitted).

Here, Saliba alleged in his "hostile work environment" claim that American engaged in various forms of alleged misconduct, including requiring a fitness-for-

duty examination; placing him on leave; delaying a paycheck; scheduling a hearing during his vacation (but then immediately re-scheduling it); and threatening to terminate him. 2-SER-93-97.

While Saliba alleged he "felt he was being discriminated against," 2-SER-95:11, his TAC did not plead any *facts* from which the Court could plausibly infer that American's alleged conduct was *based on his national origin*. *Ashcroft*, 556 U.S. at 678 (complaint must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged"); *In re Gilead Sciences Securities Litigation*, 536 F.3d 1049, 1055 (9th Cir. 2008) (court is not required to accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.").

On the contrary, Saliba affirmatively alleged that American's conduct was *not* based on his national origin: he "feels he is being targeted for refusing to accept an amendment to his employment contract," and "Defendant Raynor willfully conducted the [Section 21] hearing to discipline [Saliba] and coerce him into accepting an amendment to his Contract." 2-SER-93:16-17, 94:15-17. Saliba then underscored that he "is being targeted by the Defendants and he can only conclude that every one of Defendants actions is calculated to exert maximum pressure to force [Saliba] into submission and surrendering his authority over his medical Certificate." 2-SER-97:14-16.

By Saliba's own admissions, therefore, American's actions were motivated *not* by his national origin, but by his refusal to comply with American's masking and vaccination policies—which is not a characteristic protected by Title VII. *See e.g. Shooter v. Arizona*, 4 F.4th 955, 960–61 (9th Cir. 2021) ("Although the complaint adequately pleads that Ugenti-Rita was treated differently from [plaintiff] in a variety of respects, it fails to plead sufficient facts to raise a plausible inference that Mesnard and Adams acted with a 'discriminatory intent' based on [plaintiff's] sex. … On the contrary, the complaint affirmatively alleges that the differential treatment was due to Mesnard's and Adams's asserted desire 'to end [plaintiff's] attempts to uncover evidence of corruption…").[16]

Further, to the extent Saliba's claim challenged the fitness-for-duty examination, discipline, and hearing procedures that American required, the claim would require interpretation of the JCBA, triggering RLA preemption. 2-SER-

[16] Indeed, as the District Court pointed out, the only reference to national origin appeared in the police report attached to the TAC, in which the police identified Saliba "as a Middle Eastern individual" in the "race" section of the form. 1-SER-12, 2-SER-214. But the *police's* mere mention of national origin does not raise a reasonable inference that any of *American's* alleged conduct was motivated by national origin. *Guevara v. Marriott Hotel Servs., Inc.*, 2012 WL 4097721, at *6 (N.D.Cal. Sept. 17, 2012) ("The fact that Plaintiff is Hispanic and the Marriott employees that testified at the arbitration hearing are Caucasian, without more, does not suffice to establish that the alleged false statements made at the arbitration hearing were premised on racial animus.").

93:22-24 (alleging American "wrongfully issued a Section 21 disciplinary hearing letter" and "demand[ed] a fitness for duty examination without cause").

In short, the District Court correctly concluded that Saliba failed to adequately plead a hostile work environment claim.

B. Saliba's appellate arguments do not save the claim.

In his opening brief, Saliba attempts to belatedly remedy the deficiencies of his pleading—but it is too little, too late. He asserts his "belief" that American disciplined him because he is a "man of Middle Eastern descent … standing up for his right and refusing to bend the rules and violate the Federal Aviation Regulations." AOB-33. An appellate brief is not a substitute for a pleading. *City of Oakland v. Oakland Raiders*, 2019 WL 3344624, at *10 (N.D. Cal. July 25, 2019) ("argument in a brief cannot substitute for allegations of a complaint"). Regardless, his bare "belief" of discrimination without underlying *facts* is, once again, insufficient to assert a plausible claim.[17]

Saliba also references (AOB-32) an EEOC determination from June 6, 2002, which found that America West Airlines had discriminated against Saliba in the

[17] Saliba's opening brief also asserts that he complained that other pilots weren't disciplined for not wearing a mask. AOB-32. Setting aside that this allegation is absent from the TAC, Saliba's record citation shows no such thing. *Id.* (citing 4-SER-502) (document purporting to be the transcript from Saliba's Section 21 hearing in which he makes no mention of other pilots' non-compliance)).

aftermath of the September 11, 2001 attacks, and invited the parties to conciliate. 2-SER-157-58. A finding involving America West more than twenty years ago raises no rational inference of discrimination by American today.

Saliba also argues that American has delayed investigating his alleged discrimination complaint while the hearing process continues under the JCBA, and that this "delay tactic" is an effort to "secure some concessions through the union." AOB-33. To the extent Saliba now relies on this supposed "delay" as a basis for his hostile work environment claim, the allegations are thoroughly intertwined with the JCBA and RLA-preempted.

Finally, Saliba suggests that American's delay in investigating his complaint of discrimination violated a "settlement contract" between him and America West Airlines. But setting aside the absence of any facts showing a breach of the alleged settlement contract, the claim at issue is hostile work environment under Title VII. On that score, Saliba fails to allege anywhere in his complaint that American's alleged investigation delay was motivated *by his national origin*, rather than by a desire "to force [Saliba] into submission and surrendering his authority over his medical Certificate." 2-SER-97:14-16. As such, this allegation does not save his Title VII claim.

The District Court gave Saliba multiple opportunities to amend his complaint, and he did so three times. At that third failed attempt—and given

Saliba's admissions that American's conduct was *not* motivated by national origin animus—the District Court did not abuse its discretion in denying further leave to amend. *Chodos*, 292 F.3d at 1003; *Airs Aromatics, LLC v. Victoria's Secret Stores Brand Mgmt., Inc*., 744 F.3d 595, 600 (9th Cir. 2014) ("A party cannot amend pleadings to directly contradict an earlier assertion made in the same proceeding.") (quotations and alterations omitted).

CONCLUSION

The Court should affirm the judgment in all respects.

Respectfully submitted,

DATED: June 22, 2023

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DATED: June 22, 2023

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CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 32-1

Pursuant to Circuit Rule 32-1, Appellants hereby certify that the text of this Opening Brief is double spaced, uses a proportionately spaced typeface, and contains a total of 10,698 words, based on the word count program in Microsoft Word.

Respectfully submitted,

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STATEMENT OF RELATED CASES

There are no related cases.

Respectfully submitted,

DATED: June 22, 2023

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ADDENDUM

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UNITED STATES CODE

42 U.S. Code § 1983 - Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S. Code § 2000e-2 Unlawful employment practices (excerpt)

(a) Employer practices

It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

FEDERAL REGULATIONS

14 CFR § 61.3 Requirement for certificates, ratings, and authorizations. (excerpt)

(c) Medical certificate.

(1) A person may serve as a required pilot flight crewmember of an aircraft only if that person holds the appropriate medical certificate issued under part 67 of this chapter, or other documentation acceptable to the FAA, that is in that person's

physical possession or readily accessible in the aircraft. Paragraph (c)(2) of this section provides certain exceptions to the requirement to hold a medical certificate.

(2) A person is not required to meet the requirements of paragraph (c)(1) of this section if that person—

(i) Is exercising the privileges of a student pilot certificate while seeking a pilot certificate with a glider category rating, a balloon class rating, or glider or balloon privileges;

(ii) Is exercising the privileges of a student pilot certificate while seeking a sport pilot certificate with other than glider or balloon privileges and holds a U.S. driver's license;

(iii) Is exercising the privileges of a student pilot certificate while seeking a pilot certificate with a weight-shift-control aircraft category rating or a powered parachute category rating and holds a U.S. driver's license;

(iv) Is exercising the privileges of a sport pilot certificate with glider or balloon privileges;

(v) Is exercising the privileges of a sport pilot certificate with other than glider or balloon privileges and holds a U.S. driver's license. A person who has applied for or held a medical certificate may exercise the privileges of a sport pilot certificate using a U.S. driver's license only if that person—

(A) Has been found eligible for the issuance of at least a third-class airman medical certificate at the time of his or her most recent application; and

(B) Has not had his or her most recently issued medical certificate suspended or revoked or most recent Authorization for a Special Issuance of a Medical Certificate withdrawn.

(vi) Is holding a pilot certificate with a balloon class rating and is piloting or providing training in a balloon as appropriate;

(vii) Is holding a pilot certificate or a flight instructor certificate with a glider category rating, and is piloting or providing training in a glider, as appropriate;

(viii) Is exercising the privileges of a flight instructor certificate, provided the person is not acting as pilot in command or as a required pilot flight crewmember;

(ix) Is exercising the privileges of a ground instructor certificate;

(x) Is operating an aircraft within a foreign country using a pilot license issued by that country and possesses evidence of current medical qualification for that license;

(xi) Is operating an aircraft with a U.S. pilot certificate, issued on the basis of a foreign pilot license, issued under § 61.75, and holds a medical certificate issued by the foreign country that issued the foreign pilot license, which is in that person's physical possession or readily accessible in the aircraft when exercising the privileges of that airman certificate;

(xii) Is a pilot of the U.S. Armed Forces, has an up-to-date U.S. military medical examination, and holds military pilot flight status;

(xiii) Is exercising the privileges of a student, recreational or private pilot certificate for operations conducted under the conditions and limitations set forth in § 61.113(i) and holds a U.S. driver's license;

(xiv) Is exercising the privileges of a flight instructor certificate and acting as pilot in command or a required flightcrew member for operations conducted under the conditions and limitations set forth in § 61.113(i) and holds a U.S. driver's license; or

(xv) Is exercising the privileges of a student pilot certificate or higher while acting as pilot in command on a special medical flight test authorized under part 67 of this chapter.

14 CFR § 61.53 Prohibition on operations during medical deficiency.

(a) Operations that require a medical certificate. Except as provided for in paragraph (b) of this section, no person who holds a medical certificate issued under part 67 of this chapter may act as pilot in command, or in any other capacity as a required pilot flight crewmember, while that person:

(1) Knows or has reason to know of any medical condition that would make the person unable to meet the requirements for the medical certificate necessary for the pilot operation; or

(2) Is taking medication or receiving other treatment for a medical condition that results in the person being unable to meet the requirements for the medical certificate necessary for the pilot operation.

EXECUTIVE ORDERS

Executive Order 13998 (January 21, 2021)—Executive Order on Promoting Safety in Domestic and International Travel (excerpts)

Sec. 2. Immediate Action to Require Mask-Wearing on Certain Domestic Modes of Transportation.

(a) Mask Requirement. The Secretary of Labor, the Secretary of Health and Human Services (HHS), the Secretary of Transportation (including through the Administrator of the Federal Aviation Administration (FAA)), the Secretary of Homeland Security (including through the Administrator of the Transportation Security Administration (TSA) and the Commandant of the United States Coast Guard), and the heads of any other executive departments and agencies (agencies) that have relevant regulatory authority (heads of agencies) shall immediately take action, to the extent appropriate and consistent with applicable law, to require masks to be worn in compliance with CDC guidelines in or on:

(i) airports;

(ii) commercial aircraft;

(iii) trains;

(iv) public maritime vessels, including ferries;

(v) intercity bus services; and

(vi) all forms of public transportation as defined in section 5302 of title 49, United States Code.

SECURITY DIRECTIVES

SD 1542-21-01 (excerpt)

DEFINITIONS

For the purposes of this SD, the following definitions apply:

Conveyance has the same definition as under 42 CPR 70.1, meaning "an aircraft, train, road vehicle, vessel. .. or other means of transport, including military."

Mask means a material covering the nose and mouth of the wearer, excluding face shields.

ACTIONS REQUIRED

Except at locations under the control of an aircraft operator, foreign air carrier, or a federal government agency or their contractors, the airport operator must apply the following measures:

A. The airport operator must make best efforts to provide individuals with prominent and adequate notice of the mask requirements to facilitate awareness and compliance. This notice must also inform individuals of the following:

1. Federal law requires wearing a mask at all times in and on the airport and failure to comply may result in removal and denial of re-entry.

2. Refusing to wear a mask in or on the airport is a violation of federal law; individuals may be subject to penalties under federal law.

B. The airport operator must require that individuals in or on the airport wear a mask, except as described in Sections D., E., and F.

1. If individuals are not wearing masks, ask them to put a mask on.

2. If individuals refuse to wear a mask in or on the airport, escort them from the airport.

C. The airport operator must ensure direct employees, authorized representatives, tenants, and vendors wear a mask at all times in or on the airpmi, except as described in Sections D., E., and F.

D. The requirement to wear a mask does not apply under the following circumstances:

1. When necessary to temporarily remove the mask for identity verification purposes.

2. While eating, drinking, or taking oral medications for brief periods. Prolonged periods of mask removal are not permitted for eating or drinking; the mask must be worn between bites and sips.

3. While communicating with a person who is deaf or hard of hearing, when the ability to see the mouth is essential for communication.

4. If unconscious (for reasons other than sleeping), incapacitated, unable to be awakened, or otherwise unable to remove the mask without assistance.

E. The following conveyances are exempted from this SD:

1. Persons in private conveyances operated solely for personal, non-commercial use.

2. A driver, when operating a commercial motor vehicle as this term is defined in 49 CFR 390.5, if the driver is the sole occupant of the vehicle.

F. This SD exempts the following categories of persons from wearing masks:

1. Children under the age of 2.

2. People with disabilities who cannot wear a mask, or cannot safely wear a mask, because of the disability as defined by the Americans with Disabilities Act (42 U.S.C. 12101 et seq.). 7

3. People for whom wearing a mask would create a risk to workplace health, safety, or job duty as determined by the relevant workplace safety guidelines or federal regulations.

G. If an individual refuses to comply with mask requirements, follow incident reporting procedures in accordance with the Airport Security Program and provide the following information, if available:

1. Date and airport code;

2. Individual's full name and contact information;

3. Name and contact information for any direct airport employees or authorized representatives involved in the incident; and

4. The circumstances related to the refusal to comply.

SD 1544-21-02 (excerpt)

ACTIONS REQUIRED

A. The aircraft operator must provide passengers with prominent and adequate notice of the mask requirements to facilitate awareness and compliance.

At a minimum, this notice must inform passengers, at or before check-in and as a pre-flight announcement, of the following:

1. Federal law requires each person to wear a mask at all times throughout the flight, including during boarding and deplaning.

2. Refusing to wear a mask is a violation of federal law and may result in denial of boarding, removal from the aircraft, and/or penalties under federal law.

3. If wearing oxygen masks is needed because of loss of cabin pressure or other event affecting aircraft ventilation, masks should be removed to accommodate oxygen masks.

B. The aircraft operator must not board any person who is not wearing a mask, except as described in Sections D., E., and F.

C. The aircraft operator must ensure that direct employees and authorized representatives wear a mask at all times while on an aircraft or in an airport location under the control of the aircraft operator, except as described in Sections D., E., and F.

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CERTIFICATE OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 2029 Century Park East, Suite 3500, Los Angeles, California 90067-3021.

On June 22, 2023, I certify that I served the within document:

APPELLEES' ANSWERING BRIEF

by mail, on the person(s) listed below:

Bahig Saliba
[redacted]
Email: medoverlook@protonmail.com
PRO SE

I declare under penalty of perjury under the laws of the United States of America and the State of California that the above is true and correct.

Executed on June 22, 2023, at Los Angeles, California.

Rachel D. Victor